

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Service Rules for the 698-746, 747-762)	WT Docket No. 06-150
and 777-792 MHz Bands)	
)	
Implementing a Nationwide,)	PS Docket No. 06-229
Broadband, Interoperable Public Safety)	
Network in the 700 MHz Band)	
)	
Development of Operational, Technical)	WT Docket No. 96-86
and Spectrum Requirements for)	
Meeting Federal, State and Local Public)	
Safety Communications Requirements)	
Through the Year 2010)	
To: The Commission		

**REPLY COMMENTS OF
CYREN CALL COMMUNICATIONS CORPORATION**

Cyren Call Communications Corporation (“Cyren Call”) respectfully submits its Reply Comments in the above-entitled proceeding.¹ It is greatly encouraging that the Comments filed in response to the Federal Communications Commission’s (“FCC” or “Commission”) *Second FNPR* supported almost unanimously the FCC’s decision to establish a Public/Private Partnership (“Partnership”) for the purpose of deploying a 700 MHz Shared Wireless Broadband Network (“SWBN”) that would serve both public safety and commercial users across the nation. A number of parties recommended that the Commission define more specifically the relationship between the Public Safety Spectrum Trust (“PSST”), the non-profit entity representative of public safety that was approved by the FCC as the Public Safety Broadband Licensee (“PSBL”),

¹ In the Matter of Service Rules for the 678-746, 747-767 and 777-792 MHz Bands, *Second Further Notice of Proposed Rulemaking*, WT Docket No. 06-150, 83 FR 29,582 (2008) (“*Second FNPR*”).

and the not-yet-selected D Block licensee, as well as the rules governing the SWBN.

Nonetheless, in general, commenting parties urged the FCC to address those issues promptly and then move forward with the Partnership and a re-auction of the D Block license.

As one of the PSST's advisors, Cyren Call fully supports the PSST's Reply Comments being filed simultaneously herewith. The PSST's commitment to the Partnership and its willingness to maintain an open dialogue with public safety representatives throughout the country, with the FCC and with prospective D Block bidders augurs well for finding an achievable balance between public safety and commercial interests and, therefore, for a successful D Block re-auction.²

This is the issue upon which all interested parties should be focused – establishing the right regulatory framework for a successful D Block re-auction, a successful Network Sharing Agreement (“NSA”) negotiation, and a successful deployment of the SWBN.³ Unfortunately, a small number of comments also include allegations and innuendos regarding Cyren Call and, specifically, its relationship with the PSST, that require a response. In particular, the comments

² The recommendation by less than a handful of commenters that the FCC should consider rescinding the PSST's license does not warrant serious consideration. *See* Comments of the Public Interest Spectrum Coalition (“PISC”) at 4-5; Comments of the Association of Public-Safety Communications Officials-International, Inc. (“APCO”) at 24-25. The PSST was formed and has operated in strict compliance with the FCC's requirements and has fulfilled every obligation assigned to the PSBL. The individuals serving on its Board of Directors, all of whom are volunteers, provide precisely the balance envisioned by the Commission when it specified the organizations that must be represented on the PSBL Board. They have served diligently to promote public safety access to advanced communications capabilities and should be lauded for their unstinting labors.

³ It is beyond dispute that the initial D Block auction did not produce its hoped-for result. However, it also should be recognized that the public-private partnership structure, spectrum sharing arrangements and related auction rules all involved very innovative thinking and necessitated a complicated balancing of very divergent interests. To add to the challenge, the whole process was squeezed into an abbreviated timeframe, to meet an inflexible statutory auction deadline. These factors – rather than the imaginative musings of those more focused on conjuring up conspiracy theories than on helping to develop a viable proposal for providing the long-overdue modern, reliable, affordable and suitable communications solutions that our country's first responders need and deserve - explain why the first attempt was not successful. With that experience and the further record developed in this proceeding, the ingredients are present for the Commission to fashion a far more informed and comprehensive process that may, with some good fortune and much hard work, lead to a successful outcome on the second try.

of Verizon Wireless (“Verizon”) and the PISC are so misleading, whether intentionally or negligently, that they cannot be permitted to stand uncorrected.

Verizon not only holds an enviable share of the American wireless marketplace, its dominant spectrum position was substantially enhanced in the recent 700 MHz auction,⁴ further cementing its leadership status in a rapidly consolidating domestic wireless industry. The PISC is an ideologically driven organization that appears committed to convincing the FCC to impose network neutrality, open access and mandatory wholesale obligations on wireless providers. These are strange bedfellows indeed, but both appear to have found in Cyren Call – and its supposed (but undocumented and unproven) campaign to exert an unidentified, yet clearly (to them, at least) improper, influence over the PSST – a common foil for advancing their respective radically opposite policy prescriptions and organizational agendas.

It is not possible to “prove” a negative, particularly to those who would equate the absence of any evidence or finding of wrongdoing to the preternatural ability of the supposed wrongdoer to cover its tracks and conceal its ends. It is no easier to change the minds of those whose opinions are based, not on facts, but on biases that are born of and support their own self-interest.⁵ Nonetheless, because the persistent drumbeat of criticism from these organizations not only has wrongly impugned Cyren Call, but could have a negative impact on the PSST, Cyren Call feels compelled to reaffirm the following facts on the record in this proceeding.

⁴ Verizon spent \$9.36 billion in Auction 73 to acquire the 22 MHz C Block license through the Continental United States and Hawaii, as well as Lower 700 MHz A Block and B Block licenses in various markets.

⁵ For instance, although the PISC expressly acknowledged in its Comments that no one has demonstrated that either the PSST or Cyren Call “violated any rules or committed any wrong doing,” PISC Comments at 4-5, it nevertheless urges the FCC to rescind the PSST’s license. It is not clear on what basis the FCC would take such an extraordinary action, absent a finding that the PSST had engaged in a most serious violation of the Commission’s rules and regulations or that the public interest demanded that the FCC initiate a proceeding to rescind the PSST’s authorization.

First, neither Verizon nor the PISC could accuse Cyren Call of hiding its activities or its intentions. Cyren Call could not have picked a more open and more visible venue in which to conceive, publicize and tirelessly promote the SWBN network concept. It filed a Petition for Rule Making with the FCC in 2006 in which it proposed the Partnership as the only viable means of providing public safety with a nationwide, interoperable, advanced technology network.⁶ In its Petition, it urged the FCC to license broadband spectrum on a nationwide basis to a trust composed of and controlled by members of the public safety community. It solicited and obtained support for its Petition from public safety organizations and personnel throughout the nation, and it pursued legislative action in support of its Petition.

Second, Cyren Call's "campaign" was driven by one, and only one, reality: public safety did not then, does not now, and will not in the future have funding that is adequate to meet its increasingly critical – and costly – communications requirements. As stated in the Petition, only by making spectrum available to a commercial network partner on economically favorable terms can public safety overcome this severe and persistent funding limitation. Cyren Call has consistently argued in favor of a true partnership between public safety, represented by the PSST, and the commercial builder/operator of the SWBN. If public safety merely obtains access to a SWBN as a "valued preferred customer," public safety never will enjoy a partner's influence over or input into the development or operation of a modern commercial wireless network.

Through the entire process – from the initial filing of its Petition, to its participation in the open, competitive process to be selected as the PSST's advisor, to documenting its relationship with the PSST – Cyren Call made no secret that it was a for-profit corporation or that it hoped to be engaged by the PSST in a long-term role that would enable it to assist the

⁶ See Petition for Rulemaking of Cyren Call Communications Corporation, RM 11348, filed April 27, 2006 ("Petition").

PSST in carrying out its obligations and responsibilities as the PSBL, while at the same time permitting Cyren Call to earn a return on its efforts and expertise and for its investors. The Commission subsequently has made it clear that it views the scope of the PSBL's permissible activities as substantially narrower than those that Cyren Call and the PSST initially concluded – based on what each of Cyren Call and the PSST believed was reasonably required for the PSST to discharge the obligations and responsibilities that had been assigned to it under the terms of the rules adopted by the Commission in this proceeding.⁷ As is evident from the PSST's Comments and Reply Comments in response to the *Second FNPR*, the PSST (and thereby Cyren Call) accepts the FCC's determination and has modified its proposed activities accordingly.

Third, Cyren Call does not and cannot “control” the PSST. Cyren Call has stated publicly, including in a Congressional hearing, that it has two agreements with the PSST.⁸ The first is an agreement whereby Cyren Call provides defined services to the PSST for agreed upon fees, which agreement is terminable (other than for identified causes) on thirty days notice – hardly the hallmark of an adhesion contract. The second is a package of loan documents containing the terms and conditions applicable to advances of funds from Cyren Call to the PSST, which are modeled on normal, arm's-length terms found in typical commercial loan transactions.⁹ The agreements relevant to these two arrangements were negotiated on behalf of

⁷ In the Matter of Service Rules for the 678-746, 747-767 and 777-792 MHz Bands, *Second Report and Order*, WT Docket No. 06-150, 22 FCC Rcd 15,289 at ¶ 383 (2007) (“*Second R&O*”).

⁸ These documents were made available to the House Energy and Commerce Subcommittee on Telecommunications and the Internet upon its request.

⁹ Because the FCC proposal establishing the PSBL did not identify any financing source to support its activities, particularly prior to the issuance of a D Block license, the PSST's Request for Proposal specifically requested advisor applicants to identify their plans for obtaining the financing realistically required by the PSST to fund its activities at least until it entered into the NSA with the D Block auction winner. See *Second R&O*. Cyren Call investigated numerous potential sources of financing for the PSST, but determined that – since the PSST, a non-stock, non-profit corporation, had no assets to serve as collateral to support a loan, no existing or certain near-term revenue stream to borrow against, and since grant funding as well as government appropriations, in the best cases, were speculative and not realistically available in the near-term – the type of loan arrangements that it proposed to structure were the only viable source of such financing. The PSST has acknowledged publicly that it received RFP

the PSST aggressively and at length by its eminently able counsel from Hogan & Hartson.¹⁰

Neither arrangement provides Cyren Call with any measure of control or undue influence over the PSST's activities or its decision making processes.¹¹ Any impartial review of the PSST-Cyren Call agreements would conclude that the parties satisfy the specific rule prohibiting a commercial interest in the ownership or management of the PSST,¹² as well as the more general FCC control analysis articulated in the *Intermountain Microwave* and *Motorola* cases.¹³

The *Intermountain Microwave* case relies on six factors in analyzing whether a common carrier wireless system licensee has improperly relinquished control of its facilities.¹⁴ The *Motorola* test, traditionally used for private radio licensees such as the PSST, has a different

responses from ten applicants, including Cyren Call. Cyren Call does not have access to the other responses and so does not know what, if anything, those candidates proposed as possible solutions to meet the PSST's near-term funding needs. However, Cyren Call would note that none of the critics of its loan arrangements with the PSST – including some who, by virtue of their representation on the PSST Board, presumably have access to the other nine RFP responses – have suggested any specific, realistically available alternative financing sources that could have been accessed.

¹⁰ Cyren Call played no role in recommending or selecting Hogan & Hartson as the PSST's counsel, nor has Hogan & Hartson ever provided legal services to Cyren Call.

¹¹ Public safety entities that hold FCC licenses routinely employ qualified for-profit entities to advise them regarding their communications systems and plans, including their anticipated dealings with third parties on those topics. It also is not uncommon for public safety entities to incur indebtedness in the form of vendor financing, normally sourced through or involving commercial, for-profit entities, to pay for the equipment, construction, and sometimes ongoing operation of these systems.

¹² 47 C.F.R. § 90.523(e)(1).

¹³ *Intermountain Microwave*, 12 FCC 2d 559 (1963) ("*Intermountain Microwave*"); Applications of Motorola, Inc. for 800 MHz Specialized Mobile Radio Trunked Systems, File Nos. 507505 et al., *Order* (issued July 30, 1985) ("*Motorola*").

¹⁴ The six elements of that test are as follows:

- 1) Does the licensee have unfettered use of all facilities and equipment?
- 2) Who controls daily operations?
- 3) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?
- 4) Who is in charge of employment, supervision and dismissal of personnel?
- 5) Who is in charge of the payment of financing obligations, including expenses arising out of operating?
- 6) Who receives monies and profits from the operation of the facilities?

The PSST's engagement of Cyren Call under the terms and conditions detailed above is in full compliance with the *Intermountain Microwave* test, including, in particular, its last two elements. The PSST has exclusive and unfettered control over the payment of its obligations, such as payments made to Cyren Call, to Hogan & Hartson, and to any other entities the PSST hires to provide needed services. Moreover, the PSST will receive whatever monies and profits are owed to it from the operation of the SWBN, consistent with whatever terms it negotiates with the D Block operator in the NSA. There is no agreement granting Cyren Call any other role, activities or compensation beyond those described herein.

standard, focusing primarily on issues related to the licensee’s supervision and its propriety interest in equipment.¹⁵ Nonetheless, both tests have the same objective – to determine whether the licensee has retained both *de jure* and *de facto* control of its system – and the agreements between the PSST and Cyren Call satisfy both.

Similarly, the more specific limitations on the PSST’s eligibility are not implicated by its arrangement with Cyren Call. Cyren Call has no management relationship with or management role within the PSST. Like the attorneys, engineers or other parties that are engaged by licensees to provide identified services based on their particular qualifications, any recommendations that Cyren Call might offer the PSST are accepted or rejected based exclusively on the determinations of the PSST Board. There are no conditions, covenants or other features of Cyren Call’s loan to the PSST that would allow Cyren Call to influence those determinations.

Finally, Cyren Call must address Verizon’s entirely inconsistent complaints about the role Cyren Call played in the D Block auction process. It first criticizes the process as excessively vague, producing what Verizon describes as a “buy now, negotiate later” model that gave the PSST, and its advisor Cyren Call, an improper degree of influence over the outcome. It then reverses itself and alleges that the specificity of the information about the Partnership and the SWBN that was provided by Cyren Call caused its concern about the viability of the proposal.¹⁶ There are any number of reasons Verizon may have elected to stand on the sidelines

¹⁵ Cyren Call will have no supervisory role with respect to the PSST in its fulfillment of its responsibilities relative to the SWBN and will have no proprietary or other ownership in the SWBN equipment, which will be owned by the D Block licensee.

¹⁶ Compare VZ filing at 33 with VZ filing at 34-36. This is not to suggest that Verizon’s comments are, in other respects, a model of consistency. For instance, after maintaining that the Partnership and SWBN concepts are so profoundly defective as to be beyond repair, and are destined to produce the insolvency of any commercial partner foolish enough to win an encumbered D Block re-auction, Verizon then demands that it not be excluded from just such a D Block re-auction process. Likewise, Verizon argues strenuously that a network’s commercial wireless customers will not stand for “subsidizing” the extension of more economical service pricing to a favored customer group, but fails to explain how its own commercial customers have managed to tolerate Verizon’s extension of GSA schedule pricing and terms only to government employee subscribers on its network.

during the D Block auction, despite its repeated protestations about the urgent need for improved public safety communications capabilities, but they assuredly do not include Verizon quailing at the prospect of negotiating an NSA with the PSST, with or without Cyren Call as its advisor.

The Commission has an urgent task at hand – the adoption of rules that will foster the Partnership and the deployment of the SWBN. The goal satisfies the FCC’s most fundamental public policy objectives since it promises to deliver advanced broadband capabilities to public safety users and consumers alike across the country and, at the same time, provide for interoperability among the nation’s first responders. Cyren Call urges the FCC to proceed promptly in proposing rules consistent with these objectives and with the record in this proceeding.

Respectfully submitted,

CYREN CALL COMMUNICATIONS
CORPORATION

_____/s/
Morgan E. O’Brien
Chairman of the Board
7925 Jones Branch Drive
Suite 6201
McLean, VA 22102-3321
(703) 760-4830

Counsel:

Elizabeth R. Sachs
Lukas, Nace, Gutierrez & Sachs, Chartered
1650 Tysons Blvd., Ste. 1500
McLean, VA 22102
(703) 584-8678

July 7, 2008